941302 JAN 27 1995

OFFICE OF THE CLERK

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October, 1994, Term

PETER A. CRAWFORD, Petitioner,

v.

CHARLES R. LAMANTIA, Respondent.

PETITION FOR WRIT OF CERTIORARI

To The United States Court of Appeals
for the First Circuit

APPENDIX

Alfred D. Ellis
Counsel of Record
Cherwin & Glickman
One International Place
Boston, MA 02110-2622
617-330-1625

COUNSEL FOR PETITIONER

41435.1

TABLE OF CONTENTS

Document		Pages
1.	Memorandum and Order of District Court Judge Wolf	A-1 - 21
2.	Judgment issued by Judge Wolf	A-22
3.	Order of Circuit Judge Stahl, September 14, 1994	A-23 - 44
4.	Judgment of September 14, 1994	A-45 - 46
5.	Motion of Secretary of Labor for Enlargement of Time to File Amicus Curiae	A-47 - 56
6.	First Circuit's Order Denying Secretary of Labor's Motion for Enlargement of Time in which to file a Brief Amicus Curiae in Support of Petition for Rehearing, November 1, 1994	A-57 - 58
7.	First Circuit Court of Appeals Errata Sheet for Order of Circuit Judge Stahl, November 28, 1994 .	A-59 - 60

8. First Circuit's Order Denying Petitioner's Motion for a Rehearing and/or a Rehearing En Banc., November 29, 1994 . . . . . A-61 - 62

9. Amended Complaint (without attachments) . . . . . A-63 - 88

10. Expert Opinion of Robert S. Socol, Principal of Willamette Management Associates . . . . . A-89 - 110

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

C.A. No. 89-1038-WF

PETER A. CRAWFORD,
Plaintiff,
V.
JOHN F. MAGEE, et al.,
Defendants.

MEMORANDUM AND ORDER

WOLF, D.J.

October 12, 1993

Defendants' motion for summary judgment in this case is directed at the amended complaint, which was filed June 10, 1993, to conform with the previously filed stipulation of dismissal. There is

no claim in the amended complaint under § 510 of ERISA (29 U.S.C. § 510) that the plaintiff, Peter A. Crawford, was terminated improperly in order to deprive him of standing to initiate or maintain this action. In addition, plaintiff is not claiming that he has a reasonable expectation of returning to employment. Rather, he asserts that he has standing to maintain the ERISA claim for breach of fiduciary duty alleged in this case by virtue of the fact that he was an employee when he brought the case, and that as a former employee he has certain rights.

Although the amended complaint has some allegations which seek to characterize it as a class action, the only recovery sought is recovery for the benefit of the Employee Stock ownership

Plan (the "ESOP"). More specifically, in his amended complaint, plaintiff states, "This suit seeks recovery for the ESOP of that excess payment made by the ESOP trustees for the Arthur D. Little ("ADL") stock plus attorneys' fees and costs." Amended complaint at 2. This allegation is consistent with the (general principles discussed in Massachusetts Mutual Life Insurance Co. v. Russell, 473 U.S. 134, 139-42 (1985), in which the Supreme Court discussed at length suits for breach of fiduciary duty, emphasizing that the terms of the ERISA statute indicate that such suits are to be brought for the benefit of the plan as a whole, rather than for the benefit of individuals. Finally, the court notes that there is no claim in the amended

complaint that the plaintiff is entitled to vested benefits.

This matter comes before me on a motion for summary judgment. Therefore, I have to look at the record in the light most favorable to the plaintiff and determine whether any material facts are genuinely in dispute. See Attallah v. United States, 955 F.2d 776, 779 (1st Cir. 1992). If facts material to the issue of his standing, or otherwise relevant to his right to maintain this action, are genuinely in dispute, I would deny the motion for summary judgment. I find, however, that although there are disputes, none of them are material to the disposition of the pending motion or, indeed, the case.

More specifically, in looking at the record in the light most favorable to the plaintiff, I assume, without deciding, that the evidence is sufficient to place in dispute whether Crawford was an employee of ADL on May 12, 1989, and thus had standing when he brought this suit.[1]

---

[1] Further consideration of the record after the August 16, 1993 hearing indicates that this assumption may not have been appropriate, and that the evidence may be insufficient, even when considered in the light most favorable to Crawford, to permit the reasonable inference that he was an employee of ADL when he initiated this action. Defendants contend, and plaintiff does not contest, that plaintiff was an employee-at-will at ADL. In November 1988, he was informed that he "would be better off elsewhere." Affidavit of Peter Crawford (March 27, 1992) ¶ 13. Defendants assert that Crawford was formally terminated, and his salary cut off on March 24, 1989. Affidavit of Diana Fahey is ¶¶ 6-7. Crawford claims that prior to March 24, 1989, he requested and received an unpaid leave of absence, which was extended until May 26, 1989. Affidavit of Peter Crawford

However, although this is not a case of a shareholder suing the corporation, I find that the principles of Rule 23.1 of the Federal Rules of Civil Procedure are substantially applicable and that the considerations are comparable. See Diduck v. Kaszycki & Sons Contractors, Inc., 974 F.2d 270, 287 (2d Cir. 1993); Thornton v. Evans, 692 F.2d 1064, 1079-80 (7th Cir. 1982) ; Mertens v. Kaiser Steel Retirement

---

(March 27, 1992) ¶ 15. Crawford concedes, however, that he did not receive a salary during this leave. Id. Notwithstanding the facts that Crawford continued to use his office and secretary from March to May, and received a bonus and partial medical insurance during this time period, the evidence that ADL terminated Crawford and cut off his salary more strongly indicates Crawford was no longer an employee after March 24, 1989. Nevertheless, I have analyzed the present motion as if Crawford was an employee and thus had standing when he filed this suit.

Plan, 744 F. Supp. 917, 923 (N.D. Cal. 1990), aff'd sub nom, Mertens v. Black, 948 F.2d 1105 (9th Cir. 1991).

In the context of a derivative suit, the named plaintiff must retain his ownership or membership interest in the derivative plaintiff throughout the litigation. Otherwise, the action abates. See Lewis v. Chiles, 719 F.2d 1044, 1047 (9th Cir. 1983); Lewis v. Knutson, 699 F.2d 230, 237-38 (5th Cir. 1983); Portnoy v. Kawecki; Berylco Industries, Inc., 607 F.2d 765, 767-69 (7th Cir. 1979). As Wright and Miller explain:

> Since plaintiff's standing to maintain a secondary action depends on the indirect interest that he has in the outcome of the litigation, it has..... been held that the ownership requirement continues throughout the suit and that the action will abate if plaintiff ceases to be a

> shareholder before the termination of the litigation.

7A Wright, Miller, and Kane, Federal Practice and Procedure § 1826. The cases that have addressed whether a person needs to continue to own stock to maintain the derivative action illuminate how the Supreme Court decision in Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101 (1988), ought to be interpreted for the purposes of this case.

The Supreme Court has enunciated a specific test for determining whether an individual has standing to maintain an ERISA claim. In Firestone, the Court stated:

> In our view, the term "participant" is naturally read to mean either "employees in, or reasonably expected to be in, currently covered employment, or former employees who "have a reasonable expectation of

> returning to covered employment" or who have a colorable claim" to vested benefits.

Id. at 117. The term "participant" was analyzed in that case because one must be a participant, beneficiary, or fiduciary to maintain a civil action in an ERISA case. See 29 U.S.C. § 1132(a) (2) For purposes of this case, the way the test ought to apply is somewhat ambiguous and that is why I mentioned the conventional interpretation of F.R.Civ.P. 23.1. The analysis done in the Rule 23.1 cases influences me to believe that when, as here, somebody was an employee when he brought the case, but was subsequently terminated, he may continue to maintain an ERISA case only if he has a proper form of economic stake in the outcome of the litigation; that is, a reasonable

expectation of returning to covered employment or a colorable claim to vested benefits.

The derivative action cases are consistent with this analysis, in that they require some economic stake. Similarly, under Firestone, unless a terminated employee alleges, as Mr. Crawford does not here, that he was terminated to deprive him of standing, his right to maintain the action must be analyzed under the "former employee" provisions of the Firestone test. Therefore, it must be determined whether Mr. Crawford has a colorable claim to vested benefits. As noted above, he makes no claim for vested benefits in his amended complaint now before the court.

Several courts have made clear that, generally, a damage claim on behalf of an ERISA plan is not a benefit claim. See Kuntz v. Reese, 785 F.2d 1410, 1411 (9th Cir.), cert. denied, 479 U-S. 916 (1986); Joseph v. New Orleans Electrical Pension and Retirement Plan, 754 F.2d 628, 630 (5th Cir. 1985). The evidence in this case indicates that Mr. Crawford's claim is a damage claim comparable to that asserted in Kuntz. The recovery sought by the amended complaint will go to the ESOP. There is no clear obligation of the ESOP to pay the plaintiff any more. The recovery will not directly affect payment to him, nor is there any ascertainable amount that he would be paid if he were allowed to maintain this action and prevailed.

The plaintiff relies largely on the cases of Sommers Drug Store Co. Employee Profit Sharing Trust v. Corrigan, 883 F.2d 345 (5th Cir. 1989), and Amalgamated Clothing and Textile Workers Union, AFL-CIO v. Murdock, 861 F.2d 1406 (9th Cir. 1988). Those are important cases. However, they are factually distinguishable from this case in crucial ways and, therefore, legally distinguishable as well.

In both Sommers and Amalgamated, the plaintiffs alleged a breach of fiduciary duty involving, in part, the liquidation of a plan in the course of paying vested benefits. See Sommers, 883 F.2d at 350; Amalgamated, 861 F.2d at 1411. In both cases, the liquidation of the plans and the payment of vested benefits were

essential elements of the alleged breaches of fiduciary duty. The cases were brought as class actions rather than derivatively because the plans no longer existed and it would not be possible for the plans to recover. Furthermore, in both cases, and most explicitly in Amalgamated, the courts indicated that if the former employees were not deemed to have standing to maintain the ERISA action, there would be no opportunity for private enforcement of the rights established by ERISA. The court in Amalgamated emphasized this point, indicating that giving standing to the plaintiffs was the only means available to give effect to the goals of ERISA. 861 F.2d at 1411. The point was expressed most explicitly when the court said:

> It would be ironic if the very acts of benefit payment and plan termination that allegedly resulted in a fiduciary personally obtaining ill-gotten profits should also serve to deny plan beneficiaries standing to seek a constructive trust on those profits to redress the fiduciaries' alleged breach of the duty of loyalty.

861 F.2d at 1418.

In the present case, the alleged breach of fiduciary duty related to the ESOP paying too much for the stock of Arthur D. Little. It did not relate to the liquidation of the ESOP plan. It did not relate to the payment of any vested benefits to Mr. Crawford or anybody else at least directly. There remain a large number of potential plaintiffs, who continue to be employees and participants in the ESOP plan, who could bring this suit. In the circumstances, the standards

of Firestone, Kuntz, and Joseph, as I have interpreted them, appear to be applicable. The conclusion that Mr. Crawford lacks standing to maintain this case is also consistent with the decisions holding that a former employee does not having standing under the "reasonable expectation of returning to covered employment" prong unless the violation alleged "in and of itself divested the aggrieved parties of their status as covered employees able to sue." Christopher v. Mobil Oil Corp., 950 F.2d 1209, 1222 (5th Cir.), cert. denied, 113 S.Ct. 68 (1992) ; see Shawley v. Bethlehem Steel Corp., 989 F.2d 652, 658-59 (3d. Cir. 1993).

In candor, I will say that it appears that my decision is inconsistent with the reasoning of the District Court in the

case of Wright v. Bosch Trucking Co., Inc., 804 F.Supp. 1069 (C.D. Ill. 1992). In Wright, the court did review the adequacy of the plaintiff's representation indicating that F.R.Civ.P. 23.1 principles apply. The court, however, found standing to exist in circumstances where I would not. I respectfully disagree with that decision.

As the plaintiff lacks standing on the foregoing analysis, the discussion could end here. In the interest of completeness, however, I will also say that if the requirements of Rule 23.1 are indeed applicable to this case, the plaintiff is not a proper representative for the derivative action, largely because the claims and defenses of the

representative party are not typical of the claims and defenses of the class.

In derivative actions, courts look to a variety of factors, including:

> economic antagonisms between representative and class; the remedy sought by plaintiff in the derivative action; indications that the named plaintiff was not the driving force behind the litigation; plaintiff's unfamiliarity with the litigation; other litigation pending between the plaintiff and defendants; the relative magnitude of plaintiff's personal interests as compared to his interest in the derivative action itself; plaintiff's vindictiveness toward the defendants; and, finally, the degree of support plaintiff was receiving from the shareholders he purported to represent.

Davis v. Comed, Inc, 619 F.2d 588, 593-94 (6th Cir. 1980) see also Larson v. Dumke, 900 F.2d 1363, 1367 (listing most of the same factors) ; GA Enterprises, Inc. v. Leisure Living Communities, Inc. 66 F.R.D. 123, 125, aff'd, 517 F.2d 24, 26 n.3 (1st

Cir. 1975) ("the interests of the unnamed plaintiffs must not be antagonistic to the interests of the representative party); Kirby v. Cullinet Software, Inc., 116 F.R.D. 303, 308 (D. Mass. 1987) (stating that in class actions, "the absence of potential conflict between the named plaintiffs and the class members and..... assurance of vigorous prosecution" are important factors in determining adequacy). In this case, there is economic antagonism between Mr. Crawford and some members of the ESOP, particularly those who also own shares in the Memorial Drive Trust, the value, of which would be diminished to the extent the ESOP recovered in this case.

In addition, Mr. Crawford's claim and the ESOP's defense are not typical. There

is, at best, a disputed fact as to whether Mr. Crawford was an employee when the case commenced in May of 1989, which relates to the issues discussed earlier concerning his standing. If at trial he lost on that issue, there would be no decision on the merits. That defense is unique to Mr. Crawford. In addition, as Mr. Crawford was terminated by Arthur D. Little, he has a unique motive for bringing this case and one might infer -although he conducted himself in a most highly professional manner during the long period he represented himself pro se -- an element of vindictiveness.

I further note, although this is not itself dispositive, that he does not seem to be getting support from others. I know there is a contention that all other

putative plaintiffs will not sue because they are intimidated, but there are a large number of employees of Arthur D. Little, including many people like Mr. Crawford with MBA's and other advanced degrees, who are especially capable of standing up and representing their own interest if they genuinely perceive that they are threatened, and, indeed, are among the class of people who are often litigious.

If the F.R.Civ.P. 23.1 adequacy requirements ought to be applied to ERISA, in my view, and I have some discretion, Mr. Crawford is not a proper party to maintain this action. I rely, however, on my earlier analysis that Mr. Crawford lacks standing under ERISA. Standing is not a discretionary matter.

Accordingly, defendants' motion for summary judgment is hereby ALLOWED.

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

C.A. No. 89-1038-WF

PETER A. CRAWFORD, Plaintiff,

V.

JOHN F. MAGEE, et al., Defendants.

JUDGMENT

WOLF, D.J.

In accordance with the Court's Memorandum and Order dated October 12, 1993 granting defendants' motion for summary judgment in the above-entitled action, it is hereby ORDERED:

Judgment for the DEFENDANTS

By the Court,

Deputy Clerk

Date: October 25, 1993

41435.1

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 93-2241

PETER A. CRAWFORD,

Plaintiff, Appellant,

V.

CHARLES R. LAMANTIA, ET AL.,

Defendants, Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

[Hon. Mark L. Wolf, U.S. District Judge]

Before

Breyer,* Chief Judge, Bownes, Senior Circuit Judge, and Stahl, Circuit Judge.

Alfred D. Ellis with whom Michelle L. Farmer and Cherwin & Glickman were on brief for appellant.

Peter J. Macdonald with whom Jeffrey B. Rudman, Hale and Dorr, James J. Dillon, and Goodwin Procter & Hoar were on brief for appellee.

September 14, 1994

---

*Chief Judge Stephen Breyer heard oral argument in this matter but did not participate in the drafting or the issuance of the panel's opinion. The remaining two panelists therefore issue this opinion pursuant to 28 U.S.C. § 46(d).

STAHL, Circuit Judge.

Plaintiff-appellant Peter Crawford filed a complaint charging defendants-appellees Paul Littlefield, Irving Plotkin and Harland Riker, Jr., individually and in their capacity as trustees of the Arthur D. Little, Inc. Employee Stock Ownership Plan and Trust ("the Plan" or "the ESOP")[1], with a breach of their fiduciary duties as defined under the Employees Retirement and Income Security Act ("ERISA"). Plaintiff now appeals the

---

[1]. The ESOP is an individual account plan, i.e. "a pension plan which provides for an individual account for each participant and for benefits based solely upon the amount contributed to the participant's account, and any income, expenses, gains and losses, and any forfeitures of accounts of other participants which may be allocated to such participant's account." 29 U.S.C. § 1102 (34).

district court's grant of summary judgment in favor of defendants. After careful consideration of plaintiff's arguments, we affirm.

I.

Factual and Procedural Background

Arthur D. Little, Inc. ("ADL") is a Cambridge-based international consulting firm. Plaintiff began working at ADL as a management consultant on June 7, 1981. In March 1988, ADL's Board of Director's voted to form an ESOP pursuant to 26 U.S.C. § 4975(e) (7) of the Internal Revenue Code, and to propose a "going-private" transaction whereby ADL would 1) acquire all outstanding publicly held shares of ADL stock; 2) cancel all existing shares of ADL stock; 3) reissue "New Shares"; and 4) sell a portion of the

New Shares to the ESOP with financing from ADL (which in turn received bank financing). Plaintiff objected to the transaction for a variety of reasons, and delivered to the Department of Labor a thirty-two page memorandum detailing his belief that, as part of the going-private transaction, the ESOP Trustees were intending to buy ADL common stock in excess of adequate consideration within the meaning of 29 U.S.C. § 1002 (18). Plaintiff urged the Department of Labor to seek an injunction enjoining ADL from consummating its plan. The Department of Labor declined plaintiff's invitation, and on June 14, 1988, the ADL disinterested shareholders approved the proposed transaction.

Thereafter, the ESOP Trustees negotiated a $32.8 million loan from ADL. The agreement provided that the to-be-purchased ADL stock would act as collateral for the loan, which was to be paid back to ADL over a seven-year period. The borrowed funds would then be used to purchase 546,520 New Shares of ADL common stock at $60 per share. At closing, the stock would immediately be deposited into a suspense account within the ESOP to be released over the next seven years, on a pro rata basis, to the individual accounts of qualified employee participants of the ESOP pursuant to the following arrangement. Each quarter, ADL agreed to make cash contributions to the ESOP in an amount sufficient to defray the principal and interest payments due ADL on the ESOP

loan. The ESOP, in turn, agreed to return the contribution immediately to ADL in repayment of its note. Meanwhile, a proportionate number of the New Shares held in the suspense account as collateral would be freed and allocated by formula to the individual accounts of participating ADL employees. In effect, ADL was agreeing to repay the loan it was making to the ESOP to fund the purchase of the New Shares, with the employees ultimately reaping the benefits.

On November 30, 1988, plaintiff was informed that due to budget cuts, he was to be terminated.[2] Plaintiff negotiated

---

[2] Plaintiff has not claimed in his amended complaint that he was terminated improperly in order to deprive him of standing to initiate or maintain this action under 29 U.S.C. § 1140.

an extension of salary and benefits until March 24, 1989, with an "unpaid leave of absence" to follow. On May 12, 1989, plaintiff filed his original complaint, pro se.[3] Plaintiff then resigned from ADL, effective May 18, 1989. Approximately one year later, on May 7, 1990, plaintiff elected to receive his total vested distribution from the ESOP in the form of 47 shares of ADL common stock

---

[3] Plaintiff originally named as defendants all trustees of the Memorial Drive Trust, the Memorial Drive Trust, the trustees of the ESOP, the ESOP and Arthur D. Little, Inc. These original defendants answered the complaint and thereafter jointly filed a motion for summary judgment. On June 9, 1993, before the court ruled on defendants' motion, all parties agreed to a joint stipulation dismissing all non-ADL ESOP trustee defendants from this action.

and a check in the amount of $51.49[4] Plaintiff subsequently retained an attorney and, on June 10, 1993, filed a motion to amend his original complaint, together with an amended complaint seeking "recovery on behalf of the ESOP for breach of fiduciary duty for the Trustees' failure to act for the exclusive benefit of the participants and beneficiaries of the ESOP plan." Plaintiff also sought class certification at this time. The

---

[4] ESOP participants may elect to receive their vested benefits in one of two ways. They may either take the shares then existing in their individual account or ask that the ESOP cash out their account. In order to cash out a plan participant, the ESOP Trustees must sell the stock then held in the participant's individual account to ADL, at a price based on the most recent appraised value of new shares. The Trustees, in turn, pay the participant the resulting cash proceeds.

district court granted plaintiff's motion to amend on June 24, 1993. The defendants then renewed their motion for summary judgment, including further argument directed at the amended complaint. After accepting additional memoranda and hearing oral argument on defendants' motion, the district court granted summary judgment in favor of defendants, citing plaintiff's lack of standing.

II.

STANDARD OF REVIEW

As always, we review a district court's grant of summary judgment de novo and, like the district court, review the facts in a light most favorable to the non-moving party. See e.g., Woods v. Friction, No. 93-2296, slip op. at 6 (1st Cir. July 29, 1994). Our review is

limited to the record as it stood before the district court at the time of its ruling. Voutour v. Vitale, 761 F.2d 812, 817 (1st Cir. 1985), cert. denied, 474 U.S. 1100 (1986). Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56 (c). A material fact is one which has the "potential to affect the outcome of the suit under the applicable law." Nereida-Gonzalez v. Tirado-Delgado, 990 F.2d 701, 703 (1st. Cir. 1993). Thus, the nonmovant bears the burden of placing at least one material fact into dispute

once the moving party offers evidence of the absence of a genuine issue. Darr v. Muratore, 8 F.3d 854, 859 (1st Cir. 1993) see also Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986) (Fed. R. Civ. P. 56(c) "mandates the entry of summary judgment, . . . upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial."). In other words, neither "conclusory allegations, improbable inferences, and unsupported speculation," Medina-Munoz v. R.J. Reynolds Tobacco Co., 896 F.2d 5, 8 (1st Cir. 1990), nor "[b]rash conjecture coupled with earnest hope that something concrete will materialize, is []

sufficient to block summary judgment," Dow v. United Bd. of Carpenters, 1 F.3d 56, 58 (1st Cir. 1993).

III.

DISCUSSION

On appeal, plaintiff makes essentially two arguments. First, plaintiff charges that the district court erred in ruling that plaintiff lacked standing to pursue his ERISA action because he was not a current employee throughout the litigation. Second, plaintiff contends that the court erred in concluding that he lacked standing because he had failed to present a colorable claim for benefits. We discuss each of these arguments below.

Plaintiff brought this action pursuant to 29 U.S.C. 1132(a)(2), which

authorizes a "participant," "beneficiary" or "fiduciary" to bring a civil action for breach of any fiduciary duty proscribed by 29 U.S.C. § 1109(a). Because plaintiff is neither a beneficiary nor a fiduciary, our central task is to determine whether plaintiff qualifies as a plan "participant" within the meaning of ERISA. ERISA defines the term "participant" to include

> any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit.

29 U.S.C. § 1002 (7) (emphasis supplied). In Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 117 (1989), the Supreme

Court interpreted this provision as providing for two distinct categories of ERISA participants: 1) "employees in, or reasonably expected to be in, currently covered employment;" or 2) former employees who have "a reasonable expectation of returning to covered employment" and/or a "colorable claim" to vested benefits. Id. at 117 (internal quotations omitted).

Plaintiff maintains that he has standing under either prong. First, he argues that he was a current employee when he initiated this action and should remain a current employee throughout the litigation for purposes of standing despite his actual termination of employment. In the alternative, he asserts that he is a former employee with

a colorable claim to vested benefits. We disagree with each of plaintiff's contentions.

With regard to plaintiff's argument that he should be considered an employee under Firestone's first prong, we note that the basis for "'[s]tanding, since it goes to the very power of the court to act, must exist at all stages of the proceeding, and not merely when the action is initiated or during an initial appeal.'" Sommers Drug Stores Co. Employee Profit Sharing v. Corrigan, 883 F.2d 345, 348 (5th Cir. 1989) (emphasis supplied) (quoting Safir v. Dole, 718 F.2d 475, 481 (D.C.Cir. 1983), cert. denied, 467 U.S. 1206 (1984)).

Therefore, although plaintiff may have had standing as a current employee

when he brought this action, by the time he filed his amended complaint, he lost this standing on account of having terminated his employment with ADL and having collected all vested benefits then due him from the ESOP.[5] Accordingly,

---

[5] In his brief, plaintiff cites Nishimoto v. Federman-Bachrach & Assoc., 903 F.2d 709 (9th Cir. 1990), as support for his position that ERISA standing is frozen in time as of the date of the initial filing of the complaint. Despite plaintiff's highly suspect manipulation of the language of Nishimoto, the case contradicts, rather than supports, plaintiff's argument. The issue in Nishimoto was whether a court could adjudicate pendent state claims following the disposition of the federal claim. At the time she filed her complaint, Nishimoto was a former employee who was eligible to receive vested benefits. She "settled" her ERISA claim by accepting a lump sum payment during the course of litigation. The court noted that Nishimoto's "receipt of all the benefits she was due under the plan indicates . . . that the ERISA claim might have become subject to dismissal at that point." Id. at 715. Thus, Nishimoto's status at the

plaintiff cannot be considered a plan participant under Firestone's first prong.

Plaintiff's argument that he has standing under Firestone's second prong fares no better. Plaintiff does not contend that he has a reasonable expectation of returning to covered employment; instead, he argues that he has a colorable claim to benefits as a former employee because, "but for" defendants breach of duty, he would have received additional, vested benefits at the time he received his lump sum payment from the ESOP. Plaintiff reaches this conclusion in stages.

---

time of filing was critical only as to whether the court was deprived of the power to adjudicate the remaining pendent state claims. See Id.

First, he notes that, under 29 U.S.C. § 1109 (a), fiduciaries who breach their fiduciary duties must make good to the plan any losses resulting from their breach. In this case, therefore, defendants would have to reimburse the plan the difference between the amount of money paid for the New Shares of ADL stock and the true market value. In deciding how that money should be allocated once returned to the fund, plaintiff asks the court, under the equitable powers granted by 29 U.S.C. § 1109(a), to allocate the funds to him and those members of the ESOP who were "cashed out" after the date of the transaction. Relying upon Sommers, 883 F.2d at 350, plaintiff contends that his share should be calculated by dividing the number of shares he received when he

left (47) by the total number of shares (546,520) and multiply that fraction (.00008) by the overpayment.

In Sommers, however, plan participants brought a class action suit to recover money lost during the liquidation of a retirement trust. Plaintiffs claimed that their lump sum payments were less than the amount due because the trustees had sold the trust stock for less than fair market value. Each claimant had a set number of shares which were undervalued when it came time to cash them in. Thus, they were not paid the full extent of their benefits. We have no such claim before us.

Unlike the claimants in Sommers, plaintiff has failed to show that defendants' alleged breach of fiduciary

duty had a direct and inevitable effect on his benefits. Defendants borrowed funds from ADL to acquire a set number of ADL New Shares, i.e., 546,520. Had defendants not overvalued the shares, they would not have borrowed as much money from ADL. Instead, a recalculation of the price of the stock would have resulted only in a smaller loan, lower principal and interest payments to be paid quarterly by ADL, and the same number of New Shares placed in the suspense account. It would <u>not</u> have resulted in a similar loan being made to the ESOP with any excess cash to be distributed to the accounts of the participants. The borrowed funds were not available for distribution; they were to

be used exclusively to buy stock, or in the alternative, to pay back the loan[6]

IV.

Conclusion

As we have explained, plaintiff failed to establish standing to sue under ERISA. The district court's grant of summary judgment in favor of defendant is therefore

Affirmed. Costs to appellees.

---

[6] We acknowledge that because the ESOP note would have been for less money, the formula by which the encumbered shares were to be released to qualified participants might have altered the rate of release of stock one way or the other. The district court was in no position to know this, however, since plaintiff failed to argue this point and further failed to provide it with the ESOP agreement. Accordingly, there was no basis for the court to infer standing from a putative accelerated release of stock.

---

7 Plaintiff makes a final argument that our recent decision in Vartanian v. Monsanto Co., 14 F.3d 697 (1st Cir. 1994), requires a more expansive view of ERISA standing. Whatever merits plaintiff's argument might have, we note that Vartanian did not involve a situation, as here, where the plaintiffs could not "establish that they were former employees with a colorable claim to vested benefits" when faced with a motion for summary judgment. See id. at 702-03 n.4. Accordingly, Vartanian is inapposite.

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 93-2241

PETER A. CRAWFORD,

Plaintiff - Appellant

V.

CHARLES R. LAMANTIA, ET AL.,

Defendants - Appellees

JUDGMENT

Entered: September 14, 1994

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The judgment of the district court is affirmed.

Costs to appellees. Costs in favor of the appellees are taxed at $64.80.

By the Court:

_____

Clerk

cc: Alfred D. Ellis, Esq.
Peter J. Macdonald, Esq.

41435.1

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

First Circuit No. 93-2241

PETER A. CRAWFORD	)
	)
Plaintiff-Appellant,	)
	)
V.	)
	)
CHARLES R. LAMANTIA, ET AL.,	)
	)
Defendants-Appellees	)
	)

MOTION OF THE SECRETARY OF LABOR FOR ENLARGEMENT OF TIME IN WHICH TO FILE A BRIEF AMICUS CURIAE IN SUPPORT OF PETITION FOR REHEARING

The Secretary of the United States Department of Labor ("the Secretary") moves this Court, pursuant to Rule 26(b) of the Federal Rules of Appellate Procedure, to enlarge until the 11th of November, 1994, the time within which the

Secretary may file a brief amicus curiae, and in support thereof says as follows:

1. On September 14, 1994 the United States Court of Appeals for the First Circuit decided and filed an opinion in this matter affirming the district court's grant of summary judgment.

2. The Secretary of Labor is charged with administering and enforcing the fiduciary provisions of the Employee Retirement Income Security Act of 1974 ("ERISA"). 29 U.S.C. §§ 1132(a)(2) and (5). Therefore, he has a substantial interest in the application of ERISA by the courts. See Donovan v. Cunningham, 716 F.2d 1455 (5th Cir. 1983), cert. denied, 467 U.S. 1251 (1984). The Secretary's interests include promoting uniformity of law protecting

beneficiaries, enforcing fiduciary standards, and ensuring the financial stability of plan assets. Secretary of Labor v. Fitzsimmons, 805 F.2d 682 (7th Cir. 1986) (en banc).

3. The First Circuit's opinion in this case raises an important issue relating to the proper construction of ERISA: Does an employee stock ownership plan ("ESOP") that pays more than adequate consideration for qualifying employer securities suffer a loss of plan assets within the meaning of ERISA § 409(a), 29 U.S.C. § 1109(a), where the ESOP purchases the, securities with the proceeds of an exempt loan? The First Circuit held that there was no loss stating that:

> Had defendants not overvalued the shares, they would not have borrowed as much money from ADL. Instead, a

> recalculation of the price of the stock would have resulted only in a smaller loan, lower principal and interest payments to be paid quarterly by ADL, and the same number of New Shares placed in the suspense account.

Crawford v. Lamantia, No. 93-2241, slip op. at 11 (6th Cir. September 14, 1994).

4. The Secretary addressed this issue concerning the proper treatment of leveraged ESOPs (i.e., ESOPs that purchase employer securities with the proceeds of exempt loans) in Reich v. Valley National Bank, 837 F. Supp. 1259 (S.D.N.Y. 1993). In that case, the Secretary argued that it would be inconsistent with the structure and purpose of ERISA, and contrary to the "adequate consideration" requirement of ERISA § 408(e), to hold that a leveraged ESOP can, in effect, pay any price per

share for employer stock, no matter how high, without suffering a loss.

The district court categorically rejected Valley National Bank's argument that the ESOP suffered no loss when it paid more than adequate consideration for the stock, id. at 1284-88, and the Bank abandoned its "no loss" argument on appeal.[1]

---

[1] Although the Bank appealed the district court's decision, the only issue raised by the Bank on appeal was whether the loss suffered by the ESOP should have been measured by the difference, if any, between what the ESOP paid for the stock and the fair market value of the stock at the time of the purchase, rather than by the total amount of contributions lost as a result of the Bank's breach of fiduciary duty. The case was finally settled this month when the Bank agreed to pay $19,000,000 to the ESOP and $44,306 in costs to the Department of Labor. Although the parties recently filed an agreement for dismissal, the Second Circuit has not yet dismissed the appeal.

5. Congress recognized in the legislative history of ERISA § 408(b) (3) that transactions involving leveraged ESOPs raise potential problems, and accordingly directed the Department of Labor and the Internal Revenue Service to give such transactions "special scrutiny" to ensure that they are primarily for the benefit of ESOP participants and beneficiaries:

> Although these transactions normally are for the benefit of plan participants and beneficiaries, the conferees recognize that there may be potential problems. For example, the interest rate should not be too high and the purchase price of the stock from the party-in-interest should not be too high, so that plan assets might be drained off. Also, the terms of the note between the party-in-interest and the plan should not allow the party-in-interest to call the note at his convenience, which might put undue financial strain on the plan. Because of such potential problems, the conferees

> intend that all aspects of these transactions will be subject to special scrutiny by the Department of Labor and Internal Revenue Service to ensure that they are primarily for the benefit of plan participants and beneficiaries.

H.R. Rep. No. 1280, 93rd Cong., 2d Sess. (1974) at 313, reprinted in 1974 U.S. Code Cong. & Admin. News 5038, 5093 (emphasis added).

6. The appellant has just filed a Petition for Rehearing and/or Rehearing En Banc. The Secretary needs additional time to review the record and, if appropriate, to prepare a brief. The Secretary first learned of the Court's decision in this matter on September 18, 1994. The Secretary has not yet received a complete set of the briefs filed before the Court, and has not yet received or reviewed the record or any evidence in the case.

7. Appropriate clearance must be obtained prior to the Secretary's filing of a brief amicus curiae. The procedure for obtaining such clearance, which includes the authorization of the Solicitor General of the United States (28 C.F.R. § 0.20(c)), cannot be completed by the current deadline, which the undersigned attorneys understand to be September 28, 1994.

8. The additional time requested by the Secretary will not appreciably delay the final resolution of the case or prejudice the parties.

Wherefore, the Secretary respectfully requests that the court enlarge until the 11th of November, 1994, the time within which the Secretary may file a brief

amicus curiae, and that the Court grant such other relief as seems proper.

Dated: September 27, 1994

Respectfully submitted,

THOMAS S. WILLIAMSON, JR.
Solicitor of Labor

MARC I. MACHIZ
Associate Solicitor
Plan Benefits Security Division

KAREN L. HANDORF
Counsel for Special Litigation

TIMOTHY HAUSER
ERIC G. SERRON
Attorneys
U.S. Department of Labor office of the Solicitor
Plan Benefits Security Division
P.O. Box 1914
Washington, D.C. 20013
(202) 219-7923

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of September 1994, true and correct copies of the foregoing:

> MOTION OF THE SECRETARY OF LABOR FOR ENLARGEMENT OF TIME IN WHICH TO FILE A BRIEF AMICUS CURIAE IN SUPPORT OF PETITION FOR REHEARING

were mailed by first class United States mail, postage prepaid, to counsel at the addresses set forth below:

Alfred D. Ellis
Cherwin & Glickman
One International Place
Boston, MA 02110
Attorney for Plaintiff-Appellant

Jeffrey B. Rudman
Hale & Dorr
60 State Street
Boston, MA 02109

Attorney for Defendants-Appellees

_____
TIMOTHY HAUSER

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 93-2241

PETER A. CRAWFORD

Plaintiff - Appellant

V.

CHARLES R. LAMANTIA, ET AL.,

Defendants - Appellees

Before

BOWNES, Senior Circuit Judge

and STAHL, Circuit Judge

ORDER OF COURT

Entered: November 1, 1994

Upon consideration of the "Motion of the Secretary of Labor For Enlargement of Time in Which to File a Brief Amicus

Curiae in Support of Petition For Rehearing",.

It is ordered that said motion be denied.

By the Court:

_____
Clerk

CC: James J. Dillon, Esq.
Jeffrey B. Rudman, Esq.
Peter J. Macdonald, Esq.
Alfred D. Ellis, Esq.
Timothy Hauser, Esq.

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 93-2241

PETER A. CRAWFORD,

Plaintiff, Appellant,

v.

CHARLES R. LAMANTIA, ET AL.,

Defendants, Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

[Hon. Mark L. Wolf, U.S. District Judge]

ERRATA SHEET

Add the following sentence to the end of footnote 6 on page 11:

Additionally, unlike the situation in Reich v. Valley Nat. Bank of Arizona, 837 F. Supp. 1259 (S.D.N.Y. 1993), where the funding of the ESOP drove the company into bankruptcy, no adverse economic effect stemming from the overvaluation was alleged here, and thus that issue is not before us.

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 93-2241

PETER A. CRAWFORD,

Plaintiff - Appellant

V.

CHARLES R. LAMANTIA, ET AL.,

Defendants - Appellees

TORRUELLA, Chief Judge,

BOWNES, Senior Circuit Judge,

SELYA, CYR, BOUDIN and STAHL,

Circuit Judges.

ORDER OF COURT

Entered: November 29, 1994

The panel of judges that rendered the decision in this case having voted to deny

the petition for rehearing and the suggestion for the holding of a rehearing en banc having been carefully considered by the judges of the Court in regular active service and a majority of said judges not having voted to order that the appeal be heard or reheard by the Court en banc,

It is ordered that the petition for rehearing and the suggestion for rehearing en banc be denied.

By the Court:

_____
Clerk

cc: James J. Dillon, Esq.
Jeffrey B. Rudman, Esq.
Peter J. Macdonald, Esq.
Alfred D. Ellis, Esq.

Direct Recipients:
James J. Dillon, Esq.
Jeffrey B. Rudman, Esq.
Peter J. Macdonald, Esq.
Alfred D. Ellis, Esq.

41435.1

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

C.A. No. 89-1038 WF

PETER A. CRAWFORD,	)
	)
Plaintiff	)
v.	)
	)
PAUL D. LITTLEFIELD, IRVING H. PLOTKIN AND HARLAND A. RIKER, JR., individually and in their official capacities as Trustees of the ARTHUR D. LITTLE, INC. EMPLOYEE STOCK OWNERSHIP PLAN AND TRUST,	)
	)
Defendants	)

AMENDED COMPLAINT

Introduction

This is an action under the Employee Retirement Income Security Act ("ERISA") seeking recovery of losses suffered by the Arthur D. Little Employee Stock Ownership Plan (ESOP). This action arises out of the purchase by the Trustees of the ESOP

of 546,520 shares of Arthur D. Little (ADL) common stock at a purchase price of $60 per share. This suit seeks recovery on behalf of the ESOP from the Trustees of the ESOP for breach of fiduciary duty for the Trustees' failure to act for the exclusive benefit of the participants and beneficiaries of the ESOP plan, ERISA 404(a),(A), by purchasing the stock of ADL on behalf of the ESOP in excess of its fair market value. This suit seeks the recovery for the ESOP of that excess payment made by the ESOP Trustees for the ADL stock, plus attorneys fees and costs.

Jurisdiction

(1) Plaintiff invokes the court's jurisdiction pursuant to 29 U.S.C. § 1132(e) [ERISA § 502(e)] and 28 U.S.C. § 1331.

Parties

(2) Plaintiff Peter A. Crawford ("Crawford" or "Plaintiff") is an individual residing at Boston, MA at the time the suit was filed. Presently, the Plaintiff is a resident of Scottsdale, AZ. Plaintiff was an employee at ADL from 1980 until May 26, 1989 and a participant in the ADL ESOP at all relevant times.

(3) Defendants Paul D. Littlefield, Irving H. Plotkin and Harland A. Riker, Jr. (collectively referred to as the "Trustees") are individuals and employees of ADL who serve as Trustees of the Arthur D. Little, Inc. Employee Stock Ownership Plan and Trust ("ESOP").

Class Action Allegations

(4) The above-named Plaintiff brings this action on his own behalf and on

behalf of all other individuals who are similarly situated; i.e., who were employees of ADL at the time the ESOP purchased the stock from ADL and who met the eligibility requirements for participation in the ESOP. Those individuals constituting the class are so numerous as to make it impractical to join all members of the class of Plaintiffs.

(5) There are questions of law and fact which are common to all members of the class. Furthermore, the questions of law and fact common to the class members predominate over any question affecting any individual class members. A class action is superior to other available methods for the fair and efficient adjudication of the controversy.

(6) The person named as a representative Plaintiff will fairly and adequately protect the interests of all class members in the prosecution of this action and in the administration of all matters relating to claims stated herein.

Allegations Common to all Counts

(7) On July 13, 1987, Plenum Publishing Corporation ("Plenum") made an unsolicited offer to purchase the controlling ADL shares which at that time were held by the Memorial Drive Trust ("MDT"), for $50 per share. Upon information and belief, the Trustees of the MDT at that time were all employees of ADL. On July 24, 1987, the Board of Directors of ADL unanimously rejected the offer. On July 30, 1987, the MDT Trustees unanimously rejected the offer.

(8) On August 14, 1987, Plenum increased its offer to the MDT to $55 in cash per share. On September 17, 1987, the MDT Trustees unanimously rejected the revised Plenum offer. On September 23, 1987, Plenum announced that it was abandoning its efforts to acquire ADL. Upon information and belief, the Plenum offer was based on the assumption that it would gain control of ADL. Plenum was therefore prepared to pay a control premium.

(9) Following the withdrawal of the Plenum offer, the quoted price of ADL common stock declined from approximately $45 per share to approximately $30 per share. On March 15, 1988, the price prevailing on NASDAQ, and quoted by independent persons, was $33 per share.

At that time, approximately twenty-five (25%) percent of the ADL common shares was held by the public.

(10) On March 16, 1988, ADL announced that it was considering a management proposal to form an ESOP to acquire all shares not currently owned by the MDT at a price of $57 per share. On March 19, 1988, it was announced that the Board of Directors of ADL and the MDT Trustees had approved the above mentioned acquisition of shares at $60 per share.

(11) Upon information and belief, the $60 transaction price and the proposed $57 transaction price, were determined largely by the requirement to exceed the earlier Plenum offer, and exceeded the fair market value of a minority interest in ADL stock determined by the public market. Upon

information and belief, if the transaction price had not exceeded the earlier Plenum offer, the MDT Trustees, the ADL Board of Directors and ADL management would have been potentially liable to the minority public shareholders of ADL and the MDT participants for breach of fiduciary responsibility for rejecting the Plenum offer. By accomplishing the transaction at a higher price, this potential liability has been removed.

(12) On June 13, 1988, Plaintiff Crawford, through his attorney, caused a letter accompanied by two memoranda (the "Memoranda") (copies of the memoranda attached hereto and incorporated herein as Exhibit "A") alleging that the proposed transaction was for an excessive price, and thus in violation of ERISA, to be

delivered to attorneys for the ESOP, the MDT, and ADL. At that time, Crawford was an employee of ADL and a member of the Arthur D. Little Employee Investment Plan ("EIP"), ADL's then employee stock ownership plan. Under ADL's management proposal to form an ESOP, all the ADL shares held by EIP would be transferred to the ESOP. The Memoranda further noted that the effects of dilution and debt resulting from the transfer of shares to the ESOP and from ADL borrowing approximately $32 million to purchase the ADL stock would lower the value of the shares. The accompanying letter demanded that the transaction be delayed until truly independent trustees could be appointed for the ESOP, and threatened to seek an injunction to have the transaction

set aside should it be completed (Exhibit "A"). Upon information and belief, Defendant Trustees took no action on Plaintiff's letter and the memorandum.

(13) On June 14, 1988, ADL purchased all Old Shares not held by the MDT or ESOP from the public, and exchanged each Old Share held by the MDT into 1.0567605 New Shares. ADL borrowed approximately $32 million from Citicorp, N.A. and the First National Bank of Boston to finance this purchase. Each New Share is substantially equivalent to .946288 Old Shares. The Old Shares have thus ceased to exist. This resulted in a dilution of value for each share. At the same time, on June 14, 1988, the ESOP purchased 546,520 New Shares from ADL at a price of $60 per share, for a total consideration paid of

$32,791,200. The ESOP borrowed $32,791,200 from ADL to finance this transaction. This purchase, and related activities will hereinafter be referred to as "the Transaction."

(13.5) Upon information and belief, as the Trustees of the ESOP purchased the New Shares which were equivalent to .946288 old shares, the ESOP should have only paid (.946288) x $32,791,200 or $31,029,919. The difference of $1,761,281 between the appraised value $60 per share and the (.946288) $60 per share for the diluted shares paid by the Trustees of the ESOP constitute excess consideration paid for the New ADL Shares.

(14) Upon information and belief, Defendant Trustees of the ESOP failed to negotiate with ADL concerning (1) the

diluted value of shares purchased by the ESOP as a result of 5.68% stock dividend granted to the MDT and (2) accounting for the debt charges for financing the ADL stock purchase from the public shareholders which would lower ADL's projected earnings thus reducing the value of the ADL shares.

(15) Upon information and belief, the Defendant Trustees of the ESOP were aware of the precise effects of dilution and debt associated with the transaction prior to its completion on June 14, 1988, but nevertheless judged the transaction price of $60 to be "not in excess of adequate consideration within the meaning of" 29 U.S.C. § 1002(18) [ERISA § 3(18)].

(16) On September 19, 1988, in a communication to the ESOP participants,

the ESOP Trustees indicated that they, with the advice of Brian M. Freeman & Co., Inc. ("Freeman"), had valued the ADL stock held by the ESOP at $54 per New Share, as of June 30, 1988, two weeks after the ESOP purchased these shares for $60. The communication noted that were it not for the effects of dilution and debt associated with the ESOP, the shares would have been valued at the transaction price of $60 per share. (See Exhibit "B" attached hereto and made a part hereof).

(17) On September 19, 1988, in a memorandum to the ADL staff, it was revealed that the MDT Trustees had valued the ADL shares at $54 per New Share as of June 30, 1988.

(18) In a proxy statement dated May 11, 1988, provided by John F. Magee,

director of ADL, to ADL shareholders and filed with the Securities Exchange Commission, ADL's net income for 1988 was projected to be $5-6 million. According to an Annual Report dated March 1989, provided to the staff of ADL, the company suffered a net loss during 1988 of $4.6 million.

(19) Upon information and belief, of the above $10.2 million difference, only $5.2 million is attributable to transaction costs and interest payments associated with the ESOP.

(20) Upon information and belief, a large portion of the remaining shortfall is associated with poor performance and the close down of Arthur D. Little Valuation ("ADLV"), a wholly-owned subsidiary of the company.

(21) In a communication dated March 1989 to the ESOP participants, the ESOP Trustees indicated that they, with the advice of Freeman, had valued the ADL stock at $52 per share as of December 31, 1988. (see Exhibit "C" attached hereto and made a part hereof. The primary reason cited for the continuing reduction in value was the losses at ADLV.

(22) Upon information and belief, the ADL employees and participants in the ESOP had little if any voice in either the decision to form an ESOP, or its terms.

As and for a First Cause of Action Against the ESOP Trustees

(Engaging in a prohibited transaction under ERISA)

(23) The allegations of paragraphs 1-22 are incorporated herein by reference as if they were specifically set forth.

(24) Arthur D. Little, Inc. (ADL), was a party in interest, as defined by 29 U.S.C. § 1002(14)(C) [ERISA § 3(14)(C)I, in the purchase of ADL shares by the ESOP on June 14, 1988.]

(25) Upon information and belief, the ESOP Trustees are participants in the MDT, and employees of ADL. Defendant Trustees are not independent Trustees as set forth in I.R.S. proposed Regulation 29 CFR part 2510,3-18(b)(3)(iii).

(26) Prior to the transaction on June 14, 1988, Defendant Littlefield was a beneficial owner of 2088 shares of ADL stock. As a result of the transaction, he received $125,280 for those shares. In

addition, each of the ESOP Trustees had indeterminate beneficial interests in the ADL shares held by the MDT. Defendant Trustees are not independent Trustees as set forth in I.R.S. proposed Regulation 29 CFR part 2510,3-18(b)(3)(iii).

(27) Because of the inherent conflicts of interest, the ESOP Trustees are not truly independent, and the burden rests upon them to prove that the $60 transaction price did not exceed adequate consideration, and they have not done so.

(28) Adequate consideration, as defined by 29 U.S.C. § 1002(18) ERISA § 3(18)], for the minority shares purchased by the ESOP on June 14, 1988 was determined by the public market price, and was no more than $33 per Old Share, or $31.23 per New Share.

(29) The sale of stock by ADL to the ESOP violated 29 U.S.C. § 1106(a), [ERISA § 406(a)], since the exemption of 29 U.S.C. § 1108(e)(1) [ERISA § 408(e)(1)] for adequate consideration was not satisfied.

(30) Upon information and belief, Defendant ESOP Trustees knew, or should have known, that adequate consideration for the ADL shares being purchased by the ESOP on June 14, 1988 was less than $60 per New Share. They acted in bad faith by approving the purchase of ADL shares at an excessive price.

(31) Upon information and belief, neither the purchase of ADL shares by the ESOP, nor the loan made by ADL to the ESOP for the purpose of purchasing these shares, was solely in the interest of the

ESOP, nor primarily for the benefit of, the ESOP participants, all in violation of 29 U.S.C. § 1104(a)(1) ERISA § 404(a)(1)]. Upon information and belief, the primary purpose of the ESOP Trustees were to entrench the existing ADL management and gain control of ADL and to exculpate them from potential liability for breach of fiduciary responsibility resulting from the rejection of the Plenum offer.

(32) The loaning of money from ADL to the ESOP violated 29 U.S.C. § 1106(a)(1)(B) [ERISA §406(a)(1)(B)], since the exemption of 29 U.S.C. § 1108(b)(3)(A) [ERISA § 408(b)(3)(A)] for loans primarily benefiting participants was not met.

(33) Therefore, Defendant ESOP Trustees are liable for breach of fiduciary responsibility pursuant to 29

U.S.C. § 1109(a) [ERISA § 409(a)] for breach by a co-fiduciary pursuant to 29 U.S.C. § 1105(a) [ERISA § 405(a)]. They are liable pursuant to 29 U.S.C. § 1109(a) [ERISA § 409(a)] to make good the losses suffered by the ESOP, for attorneys fees and costs, and for removal as Trustees.

As and for a Second Cause of Action Against the ESOP Trustees

(Breach of fiduciary duty of care)

(34) The allegations of paragraphs 1-35 are incorporated herein by reference.

(35) Upon information and belief, the valuation of ADL shares by Freeman was based largely upon optimistic projections of the future financial performance of ADL provided by officers of ADL.

(36) Upon information and belief, prior to the purchase by the ESOP of ADL

shares, the ESOP Trustees failed adequately to investigate the current and likely future financial performance of ADL.

(37) Upon information and belief, the ESOP Trustees depended excessively upon the Freeman valuation, which failed to apply proper valuation principles in its analysis. Specifically, it failed adequately to consider the prices of similar transactions and the values of similar publicly-held companies, it failed to consider the effects of dilution and debt service associated with the purchase of the ADL shares by the ESOP, and it erroneously included the value of unused real estate. It failed to recognize that, under ERISA, the value of the ADL shares

was to be determined solely by the public market price.

(38) Upon information and belief, the ESOP Trustees were not involved in negotiations regarding the price at which the ESOP would purchase the ADL shares.

(39) Therefore, the ESOP Trustees breached their fiduciary and co-fiduciary duties of care pursuant to 29 U.S.C. § 1104(a)(1)(B) [ERISA § 404(a)(1)(B)] and 29 U.S.C. § 1105(a) [ERISA § 405(a)] by failing to act with the care, skill, prudence, and diligence of prudent men. They are therefore liable under 29 U.S.C. § 1109(a) [ERISA § 409(a)] for damages for breach of fiduciary duty, and negligence, and must restore to the ESOP the losses resulting therefrom, for attorneys fees

and costs, and are subject to removal as Trustees.

WHEREFORE, the Plaintiff prays that the Court:

(i) Enter judgment against the Defendants on Count I in an amount equal to all losses suffered by the ESOP as a result of the excess price paid by the ESOP for the ADL stock on or about June 14, 1988 to be determined at trial; and

(ii) Enter judgment against the Defendants on Count II in an amount equal to all losses suffered by the ESOP as a result of the Defendants' breach of fiduciary duty to all Participants and beneficiaries

of the ESOP, to be determined at trial; and

(iii) Enter a preliminary and a permanent injunction removing the Defendants from their capacity as Trustees of the ESOP and an Order permitting the ESOP participants to elect ESOP Trustees of their own choice; and

(iv) Award Plaintiff costs and attorneys fees as provided by 29 U.S.C. § 1132(g)(1) [ERISA § 502(g)(1)].

(v) Grant Plaintiff such additional relief at the Court deems just.

Alfred D. Ellis, Esquire
BBO # 153280
CHERWIN & GLICKMAN
One International Place
Boston, MA 02110
Tel. (617) 330-1625

Dated: _____

CERTIFICATE OF SERVICE

I, Alfred D. Ellis, hereby certify that on this 10th day of June, 1993, I served a copy of the within Amended Complaint by first-class mail, postage prepaid to:

James J. Dillon, Esquire
Goodwin, Procter & Hoar
Exchange Place
Boston, MA 02109-2881

_____
Alfred D. Ellis

WILLAMETTE MANAGEMENT ASSOCIATES
8750 West Bryn Mawr Avenue, Suite 450
Chicago, Illinois 606721
312-380-4400/(Fax) 312-380-4590

July 6, 1993

Alfred D. Ellis, Esq.
Cherwin & Glickman
One International Place
Boston, MA 02110

Dear Mr. Ellis:

You have requested that I review the March 25, 1988 Brian M. Freeman & Co., Inc. report to the Trustees of the Arthur D. Little, Inc. Employee Stock Ownership Plan (the "Freeman Report"). Except as otherwise noted, all capitalized terms shall take the meaning as described in the June 14, 1988 Arthur D. Little, Inc. Proxy Statement. Based upon my review, I have found several significant procedural and conceptual errors. These relate directly to:

i. The ESOP paying a control premium for a minority interest in the Company; and

ii. Failure of the Freeman Report to adequately take into consideration the dilution associated with the shares of the MDT Sub and the shares of the ESOP Sub being converted into 1.057 shares of New Common Stock; and the MDT Put that would allow the MDT to sell to the Company up to 250,000 shares of Common Stock at a price equal to the price to be paid in the merger or, if greater, the then fair market value of the stock; and

iii. The Freeman Report inappropriately took into consideration the value of certain assets of the Company.

Control Premium

In connection with the merger, the ESOP acquired 546,520 New Shares from the Company, or approximately 21.6% of the Company's New Shares, at a price of $60 per share (the "ESOP Transaction"). This clearly is a minority interest position in the Company and even when combined with the ESOP's existing ownership position of 99,197 New Shares, the ESOP owned a minority position of approximately 25.5% of the Company's New Shares.

The Freeman Report's justifications for the ESOP paying a control premium are less than compelling. In essence, the Freeman

Report asserts that the terms and other circumstances of the purchase by the ESOP eliminate the need to apply minority discounts. These terms and circumstances include, but are not limited to, the following:

i. The right of the ESOP to sell its shares to a third party on the same basis as the MDT, assuming that the ESOP would receive the same premium as the MDT upon sale of all or a portion of the Company; and

ii. The power of the Trustee to select an independent appraiser to value the shares held by the ESOP, and thereby assures that the shares, for the purposes of the put rights, will be valued

on a basis consistent with the methodologies to value the share for purposes of the acquisition (i.e., a control value); and

iii. The fact that the interested two sets of shareholders (the MDT and the ESOP) are not divergent such that the MDT could be expected to exercise its controlling interest to the detriment of the ESOP.

This is tantamount to suggesting that since the MDT is a friendly shareholder and the ESOP has a put right at a controlling interest fair market value, that it is acceptable for the ESOP to pay a control premium for a minority position in the Company. The Freeman Report does not address the fact that the ESOP did not

acquire the attendant rights or benefits of a control shareholder. Investors are willing to pay a premium for a controlling interest in a company because of the rights and benefits that accrue to control shareholders. These include the right to affect corporate policy and strategy, dispose of assets or operations of the company, influence organizational structure, establish compensation systems, and many more perquisites of control. Investors simply do not pay a control premium for a minority interest in a company because the shares have a put right at a control interest.

The ESOP's purchase is not analogous to a situation in which there are several minority shareholders which purchase a controlling interest or 100% of a company.

A seller will not differentiate between selling his or her control interest to a single investor or group of investors. Therefore, situations arise whereby an investor group will purchase a controlling interest and no single investor will have a controlling interest in the company. It is common in this type of transaction, that the investor group have buy-sell agreements that provide for individual investors to sell their shares at a controlling interest price. In the case of the ESOP Transaction, the ESOP is not part of an investor group purchasing a controlling interest, but is merely a minority shareholder purchasing a minority interest in the Company. Even though the MDT and the ESOP may have similar interests in the Company, they are two

separate and distinct entities with different shareholder groups, and therefore, must not be considered as a single investor.

Dilution

The Freeman Report does not fully and adequately address the dilutionary impact of the merger on the ESOP. As a consequence of the merger, 4% of the New Shares will be transferred by the Company to the MDT as consideration for the impact on the value of the shares held by the MDT resulting from the ESOP's participation in the merger. This is comparable to issuing the MDT a stock dividend equal to 4% of the value of the Company. This results in a 4% diminution of the equity interest of the ESOP immediately following the merger. Therefore, if the intrinsic value of the

Common Stock is $60 per share, the ESOP will be receiving New Shares worth only $57.60 per share ($60 - .04 x 60 = $57.60), due to the dilution. In other words, the ESOP is paying $60 per share for a security worth $57.60 per share. This is in fact confirmed in the September 1988 Vol. I No. 2 Employee-Owner Update. The Update specifically addresses the decline in value of the New Shares from June 14, 1988 to June 30, 1988: "The transaction, however, provided a stock dividend for those shares rolled over from the Employees' Investment Plan to the ESOP as well as the shares held by Memorial Drive Trust. The dilution, as a result of this stock dividend, reduced the value to approximately $57 a share." Therefore, the Trustees admit that dilution was not

properly considered in arriving at the value of the ESOP's New Shares, and that the ESOP paid $60 per share for securities worth approximately $57 per share. Since the Trustees engaged the Brian M. Freeman Co., Inc. to perform the June 30, 1988 valuation update, the Freeman firm was fully aware of the dilutive impact of the merger which they erroneously failed to take into account in their fairness opinion to the Trustees.

The Freeman Report does not take into consideration the potential dilution associated with the MDT being granted an option to put 250,000 share of New Common Stock to the Company at a price equal to the greater of the merger price or the then fair market value. As indicated in the above example, the merger will result

in a 4% dilution in the value of the New Common Stock. If the true value of the New Shares is $57.60 per share the MDT put option will allow the MDT to put its shares at $60 per share, or $2.40 above the fair market value. This will further dilute the value of the New Shares by approximately $.25.

Other Assets

The Freeman Report erred in its inclusion of certain of the Company's assets in its valuation of the New Shares. A minority shareholder cannot force the sale or liquidation of assets of a company and thereby realize any value other than the company's going concern value. In deriving the pretransaction value per share, The Freeman Report added the realizable value of certain assets in

excess of the going concern value to the share prices determined by the discounted cash flow and market multiple methodologies. Accordingly, the ESOP is inappropriately paying for value which it will not be able to realize (i.e., the excess realizable value of other assets). The position taken by the Freeman Report is contrary to the Foltz v. U.S. News decision. The court recognized that "any realizable value should be attributed to the real estate only "if it was evident that the controlling interest had a firm and clear intent to dispose of the real estate within a very short or reasonable period of time [, that is,] absolute evidence .... not mere development of plans." As indicated in the Lazard Opinion

discussed below, the MDT did not intend to sell its control interest in ADL.

Reasonableness of Projections

At the time of my review, I was not provided with the financial projections relied upon by Brian M. Freeman & Co., Inc. in performing their analysis. Accordingly, I cannot and do not attest as to the reasonableness of the financial projections, nor the conclusions arrived at based on the projections. If provided to me, I will review the projections and supplement my findings as necessary at a later date.

Conclusion

The Freeman Report was significantly flawed in three major respects: allowing the ESOP to pay a control price for a minority interest position in the Company;

inadequately taking into consideration the effects of dilution on the New Share value; and inappropriately adding the excess realizable value of certain assets to the fair market value of the Common Stock of the Company, a value which the ESOP could never realize.

The March 25, 1988 Brian M. Freeman & Co., Inc. Opinion to the Trustees of the Arthur D. Little, Inc. Employee Stock Ownership Plan As Appended to the June 14, 1988 Arthur D. Little Proxy As Annexed states that they had reviewed the "Opinion to the Board of Directors concerning the fairness of the merger to the public shareholders by Lazard, Freres & Co., dated the date thereof." The Lazard Opinion As Appended to the June 14, 1988 Arthur D. Little Proxy As Annexed states: "We believe the

offer price is higher than the price that would be obtained, under existing circumstances, from an independent third party for the publicly-held shares of ADL, whether such shares were sold as a single block or in market transactions." This appears to be a clear violation of fair market value as promulgated by the Department of Labor's proposed regulation 2510.3-18(b)(2)(i) which defines fair market value "as the price at which an asset would change hands between a willing buyer and a willing seller when the former is not under any compulsion to buy and the latter is not under any compulsion to sell, and both parties are able, as well as willing, to trade and are well-informed about the asset and the market for that asset."

The Lazard Opinion further states: "We also considered the possibility that public shareholders might achieve the price that would result if ADL were to be sold as an entirety; in this regard, we noted that the MDT, which holds the majority equity position in ADL, does not intend to dispose of its interest." There appears to be no intent by the MDT to realize the excess realized value associated with certain other assets in a sales transaction. It is therefore inappropriate for the ESOP to pay for this excess realized value.

The Freeman Report does not offer sufficient evidence that the ESOP did not pay more than adequate consideration for the New Shares. This is further confirmed by The Lazard Opinion which states that

"We believe the offer price is higher than the price that would be obtained, under existing circumstances, from an independent third party for the publicly-held shares of ADL, whether such shares were sold as a single block or in market transactions." If the ESOP paid more for its New Shares than any other independent third party would have paid, then surely they paid more than fair market value, or adequate consideration for the New Shares.

Very truly yours,

Robert S. Socol

RSS:jm
Enclosure

WILLAMETTE MANAGEMENT ASSOCIATES
8750 West Bryn Mawr Avenue, Suite 450
Chicago, Illinois 606721
312-380-4400/(Fax) 312-380-4590

July 20, 1993

Alfred D. Ellis, Esq.
Cherwin & Glickman
One International Place
Boston, MA 02110

Dear Mr. Ellis:

You have requested that I supplement my letter of July 6, 1993 to include the economic loss to the ESOP as a result of the ESOP Transaction. These economic losses relate to the following:

(i) the ESOP paying a control premium for a minority interest in the Company;

(ii) the dilution associated with the shares of the MDT Sub and the ESOP Sub being converted into 1.057 shares of New Common Stock and the MDT Put; and

(iii) The Freeman Report inappropriately adding the excess realizable value of other assets to the value otherwise determined by the discounted cash flow and market multiple methodologies.

Control premiums for individual transactions vary widely; however, the median control premiums have ranged from approximately 35% to 45% over prime. Assuming that the actual control premium used in the ESOP Transaction was within the range of median control premiums, the fair market value of the New Shares, on a

minority interest basis, is likely to fall between the range of $40 to $45 per share. Accordingly, the ESOP purchased securities worth between $40 to $45 per share for $60 per share. This results in an economic loss or detriment to the ESOP of between $15 to $20 per share.

I have identified the dilutionary impact of the merger in my July 6, 1993 letter as approximately $2.65 per share. This figure was based on the intrinsic value of Common Stock being $60 per share. If the true intrinsic value of the Common Stock is between $40 to $45 per share, the dilutionary impact of the stock dividend and the MDT Put would be reduced proportionately to approximately $1.75 to $2.00 per share.

An economic loss was incurred by the ESOP because of The Freeman Report's inappropriate inclusion of the excess realizable value of certain of the Company's assets in its valuation of the New Shares. The magnitude of the economic loss is best approximated by the excess realizable value utilized by The Freeman Report. This excess realizable value ranged between $3.84 and $8.05 per share as delineated on page VII.1 of The Freeman Report.

As indicated above, the ESOP incurred substantial economic losses in purchasing the New Shares at $60 per share. I have estimated this loss to range from approximately $20.50 to $30 per share. These estimates are preliminary and I have not performed the requisite analysis to

provide you with a definitive range of economic loss incurred by the ESOP.

Very truly yours,

Robert S. Socol
Principal

RSS/IM